05-6551

No. 05 -

ORIGINAL

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 2005

SEP 17 2005

JOHN CUNNINGHAM,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FIVE

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QUESTION PRESENTED

Whether California's Determinate Sentencing Law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 9

I. CERTIORARI IS APPROPRIATE TO DECIDE WHETHER CALIFORNIA'S DETERMINATE SENTENCING LAW, BY PERMITTING SENTENCING JUDGES TO IMPOSE ENHANCED SENTENCES BASED ON THEIR DETERMINATION OF FACTS NOT FOUND BY THE JURY OR ADMITTED BY THE DEFENDANT, VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS 9

A. Introduction 9

B. California Law Directly Contravenes This Court's Precedents And Must Be Corrected To Avoid Further Constitutional Encroachments 10

C. A Split Of Authority Has Developed In The State Courts Regarding The Application Of *Blakely* and *Booker* To Sentencing Schemes Like California's Determinate Sentencing Law 18

D. This Case Presents An Excellent Vehicle For Considering The Question Presented 20

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 20

Apprendi v. New Jersey, 530 U.S. 466 (2000) 9

Blakely v. Washington, 542 U.S. 296, 125 S.Ct. 2531 (2004) 6

In re Winship, 397 U.S. 358 (1970) 11

Lopez v. State, 113 P.3d 713 (Colo. 2005) 18

Mullaney v. Wilbur, 421 U.S. 684 (1975) 11

People v. Arauz, 5 Cal.App.4th 663 (Cal.App. 1992) 12

People v. Arceo, 95 Cal.App.3d 117 (Cal.App. 1979) 13

People v. Black, 35 Cal.4th 1238 (Cal. 2005) 7

People v. Fernandez, 226 Cal.App.3d 669 (Cal.App. 1990) 14

People v. Jackson, 196 Cal.App.3d 380 (Cal.App. 1987) 13

People v. Levitt, 156 Cal.App.3d 500 (Cal.App. 1984) 13

People v. Young, 146 Cal.App.3d 729 (Cal.App. 1983) 14

Ring v. Arizona, 536 U.S. 584 (2002) 11

Smylie v. State, 823 N.E.2d 679 (Ind. 2005) 18

Specht v. Patterson, 386 U.S. 605 (1967) 11

State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (N.C. 2005) 18

State v. Brown, 209 Ariz. 200, 99 P.3d 15 (Ariz. 2004) 18

State v. Dilts, 337 Or. 645, 103 P.3d 95 (Or. 2004) 18

State v. Gomez, 163 S.W.3d 632 (Tenn. 2005) 19

State v. Maugaotega, 107 Haw. 399, 114 P.3d 905 (Haw. 2005) . . . 19

State v. Natale, 184 N.J. 458, 878 A.2d 724 (N.J. 2005) 18

State v. Shattuck, 689 N.W.2d 785 (Minn. 2004) 18

United States v. Booker, ___ U.S. ___, 125 S.Ct. 738 (2005) 9

United States v. Gaudin, 515 U.S. 506 (1995) 11

United States v. Neder, 527 U.S. 1 (1999) 21

STATUTES

CALIFORNIA PENAL CODE

Section 288.5 3

Section 1170 3

Section 1203.03 3

UNITED STATES CODE

28 U.S.C. section 1257 2

CALIFORNIA RULES OF COURT

Rule 4.408 6

Rule 4.420 12

Rule 4.421 5

Rule 4.423 6

UNITED STATES CONSTITUTION

Sixth Amendment 2

Fourteenth Amendment 3

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Petitioner John Cunningham respectfully prays that a Writ of Certiorari issue to review the decision of the California Court of Appeal entered on April 18, 2005.

OPINIONS BELOW

The California Court of Appeal issued its unpublished opinion in this case on April 18, 2005, with Presiding Justice Jones both concurring and dissenting. A copy of that opinion is attached as Appendix A. On May 4, 2005, the Court of Appeal issued a one-page order denying a rehearing and modifying its opinion. A copy of that order is attached as Appendix B. The California Supreme Court issued a one-page order denying discretionary review of the Court of Appeal's decision on June 29, 2005. A copy of that order is attached as Appendix C.

JURISDICTION

The California Supreme Court denied discretionary review on June 29, 2005. This Court has jurisdiction pursuant to 28 U.S.C. section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

B. State Statutory Provisions

California Penal Code section 288.5, subdivision (a) provides in relevant part:

> "Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense . . . or three or more acts of lewd or lascivious conduct . . . with a child under the age of 14 years at the time of the commission of the offense is guilty of the offense of continuous sexual abuse of a child and *shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years.*" (Emphasis supplied.)

California Penal Code section 1170, subdivision (b) provides in relevant part:

> "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, *the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime. . .* . In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall set forth on the record the facts and reasons

for imposing the upper or lower term. The court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law. (Emphasis supplied.)

C. State Rules of Court

Relevant California Rules of Court, which are attached as Appendix D, include the following:

Rule 4.401. Authority
Rule 4.405. Definitions
Rule 4.406. Reasons
Rule 4.408. Criteria not exclusive; sequence not significant
Rule 4.409. Consideration of criteria
Rule 4.420. Selection of base term of imprisonment
Rule 4.421. Circumstances in aggravation
Rule 4.423. Circumstances in mitigation

STATEMENT OF THE CASE

In an indictment filed on March 14, 2001, the state charged petitioner John Cunningham in Contra Costa County Superior Court with one count of continuous sexual abuse in violation of California Penal Code section 288.5, as follows:

> "On or about January, 2000 through December, 2000, at San Pablo, in Contra Costa County, the Defendant, JOHN E. CUNNINGHAM, who resided in the same home with and had recurring access to John Doe, who was a minor child under the age of 14 years, from January, 2000, to December, 2000, a period of not less than three months in

duration, did unlawfully engage in three and more acts of lewd and lascivious conduct with the child." CT 192.[1]

On May 30, 2003, the jury convicted Mr. Cunningham as charged, stating in its verdict form that it found Mr. Cunningham guilty of "a violation of PC Sec. 288.5, (continuous sexual abuse), as set forth in the indictment." CT 460. Other than what was stated on its verdict form, the jury made no other factual findings regarding Mr. Cunningham or his guilt.

At the August 1, 2003 sentencing hearing, the trial court first denied Mr. Cunningham probation. RT 728. The court then found the existence of six aggravating factors pursuant to the California Rules of Court: (1) great violence, great bodily harm, and threat thereof disclosing a high degree of viciousness and callousness (rule 4.421(a)(1)), (2) a vulnerable victim due to his age and dependence on Mr. Cunningham as his father and primary caretaker (rule 4.421(a)(3)), (3) a threat of bodily injury to coerce the victim to recant (rule 4.421(a)(6)), (4) taking advantage of a position of trust or confidence as the victim's father and caregiver (rule 4.421(a)(11)), (5) engaging in violent conduct which indicates a serious danger to society (rule

[1] Citations to "CT" denote the Clerk's Transcript filed in the California Court of Appeal, followed by the page reference. Citations to the Reporter's Transcript on Appeal are denoted "RT."

4.421(b)(1)), and (6) employment as a police officer (rule 4.408(a)). RT 728-729. The court found one mitigating factor: Mr. Cunningham's lack of any prior record (rule 4.423(b)(1)). RT 728. The court then determined that the factors in aggravation outweighed the factor in mitigation, and sentenced Mr. Cunningham to the upper term of 16 years in state prison for the continuous sexual abuse conviction. RT 729-730. That same day, Mr. Cunningham filed a timely notice of appeal. CT 589.

Relying on this Court's decision in *Blakely v. Washington*, 542 U.S. 296, 125 S.Ct. 2531 (2004), Mr. Cunningham contended on appeal that he was deprived of his Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process because the trial court imposed the upper term of 16 years by relying on aggravating factors found true neither by a jury nor beyond a reasonable doubt. The state Court of Appeal rejected this claim, finding that under California's Determinate Sentencing Law (the "DSL"), which provides for the imposition of a lower, middle, or upper term, "the exercise of judicial discretion in selecting the upper term based on aggravating sentencing factors does not implicate the right to a jury determination because the upper term is within the authorized range of punishment." Opinion at 16. Presiding Justice Jones dissented from this portion of the majority's

opinion, concluding that *Blakely* compelled a remand for resentencing since "[u]nder California's determinate sentencing scheme, the maximum sentence a court can impose without making additional factual findings is the middle term." Conc. & dis. opn. of Jones, P.J. at 1-2. On May 4, 2005, the Court of Appeal issued a one-page order denying Mr. Cunningham's petition for rehearing[2] and modifying its opinion. Appendix B.

On May 19, 2005, Mr. Cunningham petitioned the California Supreme Court for discretionary review of this issue. On June 20, 2005, while Mr. Cunningham's petition was pending, the California Supreme Court decided *People v. Black*, 35 Cal.4th 1238 (Cal. 2005), holding that criminal defendants have no federal constitutional right to a jury trial on aggravating factors used to impose an upper term sentence under the DSL. On June 29, 2005, that court issued an order denying Mr. Cunningham's Petition for Review "without prejudice to any relief to which defendant might be entitled upon finality of *People v. Black* (June 20, 2005, S126182) ___ Cal.4th ___, 2005 WL 1421815 . . . regarding the effect of *Blakely v. Washington* (2004) 542 U.S. ___, 124 S.Ct.

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[2] The Court of Appeal's order erroneously states that it denied Respondent's petition for rehearing; Mr. Cunningham, the appellant, was the only party to have filed a petition for rehearing.

2531, and *United States v. Booker* (2005) 543 U.S. ___, 125 S.Ct. 738, on California law." Appendix C. *Black* has since become final, with no change in the opinion. *See People v. Black, supra,* 35 Cal.4th 1238.

This Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS APPROPRIATE TO DECIDE WHETHER CALIFORNIA'S DETERMINATE SENTENCING LAW, BY PERMITTING SENTENCING JUDGES TO IMPOSE ENHANCED SENTENCES BASED ON THEIR DETERMINATION OF FACTS NOT FOUND BY THE JURY OR ADMITTED BY THE DEFENDANT, VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS.

A. Introduction.

As this Court has repeatedly made clear, any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. *See, e.g., Blakely v. Washington, supra,* 124 S.Ct. at p. 2536; *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000). Most recently, the Court has applied this constitutional mandate to invalidate Washington state's sentencing scheme and the Federal Sentencing Guidelines to the extent they permitted judicial fact-finding of aggravating factors to justify the imposition of a sentence greater than the maximum authorized by the jury's verdict or defendant's admissions. *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005) [Federal Sentencing Guidelines]; *Blakely v. Washington, supra,* 124 S.Ct. 2531 [Washington state's sentencing scheme].

Despite the Court's authorities in this area, California has now decided that its determinate sentencing scheme, the DSL, does not offend

the Sixth or Fourteenth Amendments even to the extent that it permits a trial judge to impose an upper term sentence based on factors in aggravation found true neither by a jury nor beyond a reasonable doubt. *People v. Black, supra,* 35 Cal 4th 1238; *see also* Opinion at 16-17. In light of California's position, certiorari is appropriate in this case for two reasons. First, this recently-settled California law directly contravenes *Blakely* and *Apprendi*. Certiorari is therefore necessary to forestall California from continuing to violate the constitutional rights of thousands of criminal defendants during sentencing. Second, a split of authority compelling resolution has now arisen in the state courts in the aftermath of *Blakely* and *Booker* regarding the application of these cases to sentencing schemes just like California's DSL. Because this case is an ideal one for resolving the important question presented, this Court should grant certiorari and hold that California's DSL, as is being applied to permit the imposition of enhanced sentences based on judicial fact-finding, violates the Sixth and Fourteenth Amendments.

B. California Law Directly Contravenes This Court's Precedents And Must Be Corrected To Avoid Further Constitutional Encroachments.

The Sixth and Fourteenth Amendments "require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a

reasonable doubt." *United States v. Gaudin,* 515 U.S. 506, 509-510 (1995); *see also Mullaney v. Wilbur,* 421 U.S. 684, 698 (1975); *In re Winship,* 397 U.S. 358, 363-364 (1970). Where proof of a particular fact exposes the defendant to greater punishment than that available in the absence of such proof, that fact is an element of the crime which the Sixth Amendment requires to be proven to a jury beyond a reasonable doubt. *Apprendi v. New Jersey, supra,* 530 U.S. at p. 490; *Mullaney v. Wilbur, supra,* 421 U.S. at p. 698; *Specht v. Patterson,* 386 U.S. 605, 607 (1967). In *Apprendi*, this Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey, supra,* 530 U.S. at p. 490; *see also Ring v. Arizona,* 536 U.S. 584, 609 (2002) [Sixth Amendment mandates that existence of an aggravating factor necessary for imposition of death penalty must be found by a jury rather than a sentencing judge].

Blakely v. Washington, supra, further elaborated on the right to a jury determination of non-recidivist aggravating factors beyond a reasonable doubt. There, the Court held that Washington state's sentencing procedure violated the Sixth Amendment because it permitted the trial court to impose a sentence above the "standard range" or

statutory maximum if it found the existence of an aggravating factor demonstrating substantial and compelling reasons for an exceptional sentence. 124 S.Ct. at p. 2538. As the Court explained:

> "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional facts." *Id.* at p. 2537 (emphasis in original).

California's DSL employs a system of sentencing choices much like Washington's sentencing scheme at issue in *Blakely*. Under California Penal Code section 1170, subdivision (b), "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, *the court shall order imposition of the middle term*, unless there are circumstances in aggravation or mitigation of the crime." (Emphasis supplied.) *See also* Cal. Rules of Court, rule 4.420(a) ["The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation."]. Thus, under the DSL, the middle term is the presumptive sentence, *see, e.g.*, *People v. Arauz*, 5 Cal.App.4th 663, 666 (Cal.App. 1992) (maj. opn.) and 674 (conc. & dis. opn. of Yegan, J.)), or as in *Blakely*, the "statutory maximum" allowable for the particular offense. In fact, a sentencing

judge in California need not even state reasons for imposing the middle term. *People v. Arceo,* 95 Cal.App.3d 117, 121 (Cal.App. 1979).

Furthermore, as with Washington's sentencing procedure, in California, the upper term may only be imposed where "exceptional" circumstances in the form of aggravating factors exist justifying a departure from the middle term. *See, e.g., People v. Jackson,* 196 Cal.App.3d 380, 390-391 (Cal.App. 1987); Cal. Rules of Court, rule 4.420(b) ["Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation."]. California's Rules of Court also only require that the sentencing judge find circumstances in aggravation by a preponderance of the evidence. Cal. Rules of Court, rule 4.420(b); *see also People v. Levitt,* 156 Cal.App.3d 500, 515 (Cal.App. 1984).

California Rules of Court, rule 4.421 sets forth a non-exhaustive list of circumstances which may constitute aggravating factors. Rule 4.408(a) provides that for purposes of making discretionary sentencing decisions, the sentencing court may consider "additional criteria reasonably related to the decision being made." *Cf. Blakely v. Washington, supra,* 124 S.Ct. at p. 2535 [Washington sentencing scheme providing "illustrative" list of aggravating factors which justify

imposition of exceptional sentence]. However, California's Rules of Court make clear that in finding the existence of an aggravating factor, the court may *not* rely on a factor which is an element of the crime. Cal. Rules of Court, rule 4.420(d) ["A fact that is an element of the crime shall not be used to impose the upper term."]; *see also People v. Fernandez*, 226 Cal.App.3d 669, 680 (Cal.App. 1990) [trial court erroneously relied on vulnerability based on young age of victim as aggravating factor in sentencing resident child molester because age range was specified in underlying offense]. Similarly, even where an aggravating factor technically is not an element of the underlying crime, California courts may not rely on it where the factor is inherent in the crime. *See, e.g., People v. Young*, 146 Cal.App.3d 729, 734 (Cal.App. 1983) [trial court improperly relied on "extreme serious nature of the offense" to aggravate defendant's sentence for assault with a deadly weapon since this offense is "obvious[ly]" an extremely serious offense]. Consequently, under California's DSL, when a sentencing court finds the existence of factors in aggravation, it necessarily finds the existence of facts *beyond* which the jury found to exist in arriving at its verdict.

California Penal Code section 288.5 -- the provision under which Mr. Cunningham was convicted -- provides that one who commits continuous sexual abuse of a child "shall be punished by imprisonment in

the state prison for a term of 6, 12, or 16 years." Cal. Pen. Code § 288.5, subd. (a). In the absence of aggravating factors, a departure from the middle term sentence of 12 years to the upper term of 16 years is unauthorized under the DSL. Pen. Code § 1170, subd. (b); *see also* Cal. Rules of Court, rule 4.420(a). Thus, pursuant to *Apprendi* and *Blakely*, the middle term of 12 years is the "statutory maximum" sentence that a judge may impose for a section 288.5 conviction "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington, supra,* 124 S.Ct. at p. 2537. Nevertheless, without the benefit of additional jury fact-finding, the trial court in this case found the existence of six aggravating factors based on which it departed from the statutory maximum of 12 years, and sentenced Mr. Cunningham to the upper term of 16 years. Moreover, by operation of California Rules of Court, rule 4.420(b), the court necessarily based its factual findings on a preponderance of the evidence standard. The California Court of Appeal held that the trial court's imposition of the upper term under these circumstances did not

contravene *Blakely* or violate Mr. Cunningham's constitutional rights to a jury trial and due process. Opinion at 16-17.[3]

Despite the similarity between Washington state's sentencing scheme and California's DSL, the California Supreme Court has now concluded -- as the Court of Appeal did here -- that the DSL does not violate the dictates of *Apprendi* and *Blakely*. *People v. Black, supra,* 35 Cal.4th at p. 1254. In *Black*, the court conceded that "[t]he mandatory language of [California Penal Code] section 1170, subdivision (b), does provide some support for defendant's position," *ibid.*, and that "section 1170, subdivision (b) can be characterized as establishing the middle term sentence as a presumptive sentence . . ." *id.* at p. 1257. However, relying on *United States v. Booker, supra,* and the discretion sentencing judges have under the DSL to impose the lower, middle, or upper term after the jury has returned a guilty verdict, the court concluded that a

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[3] According to the Court of Appeal, *United States v. Booker, supra,* 125 S.Ct. 738,

> "clarifies that *Blakely's* Sixth Amendment concerns are inapplicable to statutory provisions that merely *permit*, but do not compel, the imposition of a particular sentence upon a particular finding of fact. In California, Penal Code section 1170 permits, but does not compel, the imposition of an upper term upon the finding of one or more aggravating factors." Opinion at 17, n.14 (emphasis in original).

judge's imposition of "the upper term is the 'statutory maximum' for purposes of Sixth Amendment analysis." *Id.* at p. 1257-1258. Indeed, the court found that the DSL "preserves, rather than undermines, the traditional power of the jury." *Id.* at p. 1257.

In dissent, Justice Kennard observed: "Hard as it tries, the majority here cannot point to any significant differences between California's sentencing law and the Washington sentencing scheme that the high court invalidated in *Blakely* . . . ." *People v. Black, supra,* 35 Cal.4th at p. 1271 (conc. & dis. opn. of Kennard, J.). Moreover, as Justice Kennard explained, the judicial discretion afforded California sentencing judges under the DSL is in fact no different from the discretion afforded judges under the Washington scheme. *Ibid.*[4]

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[4] Justice Kennard concluded that pursuant to this Court's precedents,

> "under California's sentencing scheme a trial court may use an aggravating fact to justify an upper term only if: (1) a jury has made a finding on the aggravating fact, (2) the defendant has admitted the aggravating fact, (3) the defendant has validly waived the right to a jury trial on the aggravating fact, or (4) the aggravating fact relates to the defendant's criminal record rather than to the circumstances of the conviction offense. Absent one of these situations, the trial court may not impose an upper term sentence." *People v. Black, supra,* 35 Cal.4th at p. 1265 (conc. & dis. opn. of Kennard, J.).

In light of California's position regarding the constitutionality of its DSL, certiorari is necessary to make California and its sentencing scheme adhere to constitutionally acceptable standards. More importantly, this Court should grant certiorari on the issue presented to prevent California from continuing every day to violate the constitutional rights of countless criminal defendants facing sentencing in its courts.

C. A Split Of Authority Has Developed In The State Courts Regarding The Application Of *Blakely* and *Booker* To Sentencing Schemes Like California's Determinate Sentencing Law.

Certiorari is also appropriate to resolve the stark split of authority which has developed in the state courts regarding the application of *Blakely* to sentencing schemes similar to California's DSL. Decisions from Arizona, Colorado, Minnesota, New Jersey, North Carolina, Indiana, and Oregon have applied a bright-line rule, holding that the Sixth and Fourteenth Amendments are necessarily violated when a sentencing judge finds facts in imposing a sentence longer than the maximum authorized by the jury's verdicts or the defendant's admissions. *See, e.g. State v. Brown*, 209 Ariz. 200, 203, 99 P.3d 15, 18 (Ariz. 2004); *Lopez v. State*, 113 P.3d 713, 723-725 (Colo. 2005); *Smylie v. State*, 823 N.E.2d 679, 863 (Ind. 2005); *State v. Shattuck*, 689 N.W.2d 785, 786 (Minn. 2004); *State v. Natale*, 184 N.J. 458, 466, 878

A.2d 724, 728 (N.J. 2005); *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256, 264-265 (N.C. 2005); *State v. Dilts*, 337 Or. 645, 649, 103 P.3d 95, 99 (Or. 2004). On the other hand, state courts in California, Hawaii, and Tennessee, finding no bright-line rule, have concluded that such fact-finding by judges is constitutional when conducted within a sentencing scheme characterized by broad judicial discretion. *See, e.g., People v. Black, supra,* 35 Cal.4th at p. 1254 (Cal.); *State v. Maugaotega,* 107 Haw. 399, 114 P.3d 905, 914-915 (Haw. 2005); *State v. Gomez,* 163 S.W.3d 632, 661 (Tenn. 2005). As discussed in the previous section, this is precisely the approach taken by the Court of Appeal in this case. *See* Opinion at 16-17.

Since this sharp split of authority has arisen among the state's highest courts, it cannot be resolved without this Court's intervention. Thus, in order to correct the constitutional analysis in those jurisdictions which, contrary to *Blakely*, uphold sentencing schemes permitting the imposition of enhanced sentences based on judicial fact-finding -- not jury findings or defendants' admissions -- the Court should grant this Petition for Writ of Certiorari.

D. This Case Presents An Excellent Vehicle For Considering The Question Presented.

At least three aspects of this case m ke it an excellent vehicle for deciding whether California's DSL, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments. First, the case is on direct review and Petitioner unambiguously presented the federal constitutional claim to the California Court of Appeal, which denied the claim on its merits. Petitioner similarly presented the claim to the California Supreme Court, which declined to review it. Consequently, there is no procedural impediment to this Court's considering the question presented.

Second, this case only involves the finding of aggravating factors based on conduct relating to the charged offense, and is therefore unencumbered by the complexity of the recidivist-related aggravating factors exception to the jury trial right identified in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In contrast, the California Supreme Court's decision in *People v. Black, supra,* involves this very issue. Indeed, although Justice Kennard dissented from the majority's reasoning in *Black* which upheld the constitutionality of California's DSL, she concurred in the result because "in sentencing defendant to the upper

term, the trial court relied in part on [defendant's] prior criminal history and on facts found by the jury . . . ." *People v. Black, supra,* 35 Cal.4th at p. 1273 (conc. & dis. opn. of Kennard, J.). Also unlike *Black*, this case does not involve the trial court's use of an aggravating factor that the jury found true in returning its verdict. *Ibid.* [probation ineligibility finding by jury].

Third, there is every reason to believe that the constitutional violation was not harmless. The trial court imposed the upper term of 16 years based on its finding of six factors in aggravation. At the sentencing hearing, defense counsel not only objected to, and contested the factors in aggravation, but he introduced substantial evidence supporting a finding that probation was the appropriate sentence for Mr. Cunningham. RT 716-722; *cf. United States v. Neder,* 527 U.S. 1, 19 (1999) [failure to submit an element of an offense to jury will not be harmless where defendant contested omitted element and raised evidence sufficient to support a contrary finding]. Further, the state court squarely rejected Petitioner's claim on the merits, without any finding of harmless error. Opinion at 16-17. Presiding Justice Jones, who in dissent concluded that the imposition of the upper term violated Petitioner's constitutional rights under *Blakely*, would have found the

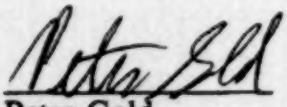
constitutional violation prejudicial and remanded for a resentencing. Conc. & dis. opn. of Jones, P.J. at 1-2. This Court should grant Mr. Cunningham's Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

DATED: September 12, 2005.

Respectfully submitted,

By: 

Peter Gold
Attorney for petitioner
John Cunningham

APPENDIX A

Filed 4/18/05 P. v. Cunningham CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, **Plaintiff and Respondent,** **v.** **JOHN CUNNINGHAM,** **Defendant and Appellant.**	**A103501** **(Contra Costa County Super. Ct. No. 010396-0)**

John Cunningham (appellant) appeals his conviction by jury trial of continuous sexual abuse of a child under age 14. (Pen. Code, § 288.5.)[1] On appeal he contends the trial court erroneously admitted the victim's hearsay statements, imposed the upper term, and based the upper term on aggravating factors not found by the jury in violation of his right to jury trial under *Blakely v. Washington* (2004) ___U.S.___ [124 S.Ct. 2531]. We reject these contentions and affirm.

BACKGROUND

Victim's Testimony

The victim, referred to at trial and herein as John Doe, is appellant's son. Doe, born in August 1989, testified that he lived with his mother, Wanda, for the first 10 years of his life. In December 1999, when Doe was 10 years old, he went to live with

[1] Appellant was sentenced to 16 years in state prison.

appellant, appellant's girlfriend, Latasha, appellant's and Latasha's baby, and Latasha's young nephew.

Doe admitted that prior to moving in with appellant, Doe falsely accused his stepfather of beating him, resulting in scars on his back, because he wanted to live with appellant and did not like his new stepfather. After appellant took Doe to the hospital Doe admitted he had lied. Doe also admitted that when he was eight years old he called the telephone number for Boys' Town and falsely reported that there was no food in his mother's house and she did not provide him with enough attention. The police and child protective services investigated the call and found Doe was healthy and had ample food at his house.

Doe testified that in January 2000, shortly after he moved in with appellant, appellant began forcibly sodomizing him and forcing him to orally copulate appellant. Sometimes while being sodomized by appellant, Doe screamed for help because it hurt "very bad" and appellant put his hand over Doe's mouth to stop Doe from screaming. The acts occurred in appellant's bedroom, the living room, the bathroom and the shower. Sometimes appellant molested Doe when he was angry with Doe. Because appellant threatened to kill Doe if he told anyone about the abuse, Doe was afraid of appellant and did not tell anyone while living with him. In December 2000, Doe first told his younger cousin, Brittany, about appellant's abuse in a note while visiting her when appellant was out of town. Before giving her the note Doe said "I have to tell you," but did not want to say it aloud. The note said, "my dad is hu[m]ping me." Thereafter Brittany showed the note to her mother, Karla, who then questioned Doe as to what it meant. Doe told Karla about appellant's repeated incidents of sodomy and forcing Doe to orally copulate him. After Karla told her husband, Gerrell, about Doe's allegations, Gerrell talked to Doe, then took him to appellant's house for a family meeting. While there, as Doe was packing his clothes, appellant confronted him while they were alone and said, "In a week you better say you are lying or else I am going to fuck you up."

After Doe reported appellant's abuse to Wanda and his stepfather, Wanda took him to the hospital. The pediatrician who performed a sexual assault examination on Doe

testified that the examination revealed no trauma to Doe's anus, consistent with most postsodomy examinations. However, the doctor said that Doe's accounts of how he felt physically during and after being sodomized and orally copulating appellant were consistent with how children report such incidents.

On January 4, 2001, Doe was interviewed by San Pablo Police Officer Jeff Palmieri. Doe told Palmieri that appellant sexually abused him numerous times beginning shortly after he moved in with appellant. On January 8, Kerry O'Malley of the Children's Interview Center (CIC) conducted a videotaped sexual assault interview of Doe.[2] Doe's statements during the CIC interview were consistent with his earlier statements to Palmieri.

On January 5, 2001, appellant agreed to a videotaped interview by Officer Palmieri and Contra Costa District Attorney's Office Inspector Ted Todd.[3] At the beginning of the interview appellant adamantly denied any type of sexual touching of Doe. As the questioning ensued, appellant became more forthcoming in his responses. After two or three hours, appellant admitted that Doe's mouth did make contact with appellant's penis for five seconds while in the shower on one occasion. Appellant also said that Doe was a liar and was manipulative and later said Doe was a homosexual and "can't quit the homosexual behavior."

Defense

Testifying in his own defense, appellant denied ever molesting Doe or any child. He also denied ever threatening to kill Doe or "fuck [him] up." Appellant testified that prior to coming to live with him, Doe had been expelled from school due to behavior problems and was not doing his homework. Other defense witnesses testified that Doe had a history of lying and his allegations against appellant were fabricated because he was unhappy about appellant's requirements regarding chores and homework.

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2 A videotape of the CIC interview was played for the jury and admitted into evidence.

3 The videotaped interview was played for the jury.

DISCUSSION

I. *Doe's Hearsay Statements Were Properly Admitted*

Appellant contends the court erred in admitting, pursuant to Evidence Code section 1360 (hereafter section 1360), the portions of the videotaped CIC interview which contained Doe's hearsay statements to Brittany and Karla. He contends the error violated his right to due process. Appellant does not argue that the admission of Doe's hearsay statements violated the Sixth Amendment right of confrontation under the rule recently announced in *Crawford v. Washington* (2004) 541 U.S. 36. Since Doe testified at trial, no Confrontation Clause violation occurred. (*Crawford*, pp. 68-69.)

Section 1360[4] creates a limited exception to the hearsay rule in criminal prosecutions regarding a child's statements describing acts of child abuse or neglect, including sexual abuse. (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1367.) In determining whether child hearsay statements possess the requisite indicia of reliability

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[4] Section 1360 provides, in relevant part:

"(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another, or describing any attempted act of child abuse or neglect with or on the child by another, is not made inadmissible by the hearsay rule if all of the following apply:

"(1) The statement is not otherwise admissible by statute or court rule.

"(2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability.

"(3) The child either:

"(A) Testifies at the proceedings.

"(B) Is unavailable as a witness, in which case the statement may be admitted only if there is evidence of the child abuse or neglect that corroborates the statement made by the child.

"(b) A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party the intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings in order to provide the adverse party with a fair opportunity to prepare to meet the statement.

"(c) For purposes of this section 'child abuse' means an act proscribed by Section . . . 288.5 of the Penal Code . . . ."

pursuant to section 1360, subdivision (a)(2), the trial court may consider such nonexclusive factors as: "(1) spontaneity and consistent repetition; (2) the mental state of the declarant; (3) use of terminology unexpected from a child of [similar] age; and (4) lack of motive to fabricate. [Citation.]" (*People v. Eccleston* (2001) 89 Cal.App.4th 436, 445; *People v. Brodit* (1998) 61 Cal App.4th 1312, 1330, citing *In re Cindy L.* (1997) 17 Cal.4th 15, 29-30.) Although courts have considerable leeway in their consideration of appropriate factors, the " 'unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made.' [Citation.]" (*Roberto V.*, at p. 1374.)

Appellant relies on *Lilly v. Virginia* (1999) 527 U.S. 116 and *People v. Eccleston, supra,* 89 Cal.App.4th 436 to argue we are to exercise de novo review over the trial court's reliability determination. This argument rests on a misunderstanding of the cited authorities. At the time section 1360 was enacted (1995), the leading case on the interpretation of the Confrontation Clause was *Ohio v. Roberts* (1980) 448 U.S. 56.[5] *Roberts* had held that the prosecution could only introduce hearsay against a criminal defendant if the statement was admitted under a firmly rooted hearsay exception or had sufficient indicia of reliability. (*Id.* at p. 66.) Since section 1360 is not a firmly rooted hearsay exception, an accused could argue under *Roberts* that a statement admitted under this section lacked the reliability required by the statute and by the Constitution. While the deferential abuse of discretion standard of review is applied to the statutory finding (*People v. Roberto V., supra,* 93 Cal.App.4th at p. 1367; *People v. Brodit, supra,* 61 Cal.App.4th at pp. 1329-1330), the stricter de novo standard of review is applied to the reliability finding under the Confrontation Clause (*Lilly*, at pp. 136-137; *Eccleston*, at pp. 445-446). Since only the statutory finding of reliability is at issue here, we apply the abuse of discretion standard. In doing so we review the trial court's ruling based on the evidence before the court at the time of the ruling. (See, e.g., *People v. Box* (2000) 23 Cal.4th 1153, 1195; *People v. Cervantes* (2004) 118 Cal.App.4th 162, 176.)

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[5] During the pendency of this appeal, the United States Supreme Court rejected the *Roberts* analysis in *Crawford v. Washington, supra,* 541 U.S. 36.

In this case, prior to trial, appellant filed a written motion in limine seeking to exclude portions of Doe's videotaped CIC interview on the basis that they did not qualify under section 1360. At the initial hearing appellant also objected to admission of Doe's incriminating statements to Brittany and other adult relatives prior to the videotaped interview.[6] The parties stipulated that the court would review the CIC interview video and sections of the police reports submitted by the prosecutor, which describe the subject statements by Doe to determine whether the statements provided sufficient indicia of reliability to be admitted under section 1360. Thereafter the court reviewed the CIC interview videotape, a transcript thereof, a police report, and a supplemental police report,[7] after which it ruled Doe's hearsay statements admissible.

A. *The Police Reports*

1. *Initial Report*

Officer Palmieri's initial report states that in his January 4, 2001 interview, Doe said that during the first molestation incident appellant made Doe touch appellant's penis and then "whipped" Doe on the buttocks with his hand for not doing his homework. Throughout the year 2000, appellant made Doe orally copulate him in the living room of the residence and appellant sodomized Doe several times while in the bathroom. Doe referred to appellant's penis as his "dingling" or "dick," and said appellant used Vaseline or oil before sodomizing him. Doe said that in December 2000 he "got in trouble by [appellant]" regarding a book report after which appellant whipped him on his buttock and had him orally copulate appellant. Two weeks before Christmas appellant sodomized him in the shower causing him great pain. Doe described having to use the bathroom after being sodomized and seeing a white film in the toilet water. He said the oral copulation and sodomy happened almost every day that he was alone with appellant.

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[6] We note that appellant's objection failed to specify which adult relatives were referred to. However, the relatives were identified in the police reports and the CIC videotape the court considered in ruling on the motion.

[7] The police reports and transcript of the CIC interview were introduced solely for purposes of the section 1360 motion, and were not admitted into evidence.

He admitted lying several times to his parents, but was adamant that his accusations regarding appellant were not lies, and he was visibly upset. When Palmieri asked why Doe was crying, he said he did not want to get anyone in trouble, loved appellant and wanted appellant to stop molesting him. Doe told Palmieri that on January 2, 2001, he looked Brittany in the eyes and told her appellant was molesting him. After Brittany told Karla, Karla confronted Doe and he told her about appellant's abuse over the last year. Doe also told Palmieri that when Karla took him back to appellant's house to confront appellant with Doe's allegations, appellant, while alone with Doe told Doe that if he did not say the allegations were a joke, he would "fuck him up." Doe also told Palmieri he did not tell anyone about the abuse for a long time because appellant threatened to kill him if he told anyone.

2. *Supplemental Report*

Officer Palmieri's supplemental report states that on January 9, 2001, he telephoned Karla and Brittany. Brittany told him that on the afternoon of January 2 while she and Doe were drawing, Doe told her he had something important to tell her but did not want to say it out loud. Doe wrote down that appellant had been "humping" him. When Brittany asked Doe if he was telling the truth, he looked her in the eyes and responded affirmatively. Brittany believed Doe was telling the truth because before he wrote the note he was "happy," and when he told her about appellant he started crying. Karla told Palmieri that after Brittany gave her Doe's note she confronted Doe and told him she wanted him to tell the truth. Doe told Karla that appellant had been "putting his dingling in [Doe's] butt," and Doe was also made to put his mouth on appellant's penis. Doe told her the incidents had been occurring for a year, often in the shower, and that appellant put Vaseline or grease "on his butt" before each act of sodomy. Doe told her the last act happened a couple of weeks before because he had not completed a book report.

B. *The CIC Videotape*

When interviewer O'Malley asked Doe if he knew why he was at CIC, Doe responded "so [he] could talk to [her]" "about something that happened to [him]." In

response to O'Malley's saying, "Well if you feel comfortable right now, [Doe], could you tell me what happened," Doe gave a detailed description of the molestation he suffered for a year by a "person" or "him." Doe described appellant's use of Vaseline and the pain he experienced while being sodomized. His description of the first incident of molestation was consistent with Palmieri's police report. Subsequently, when O'Malley asked who "him" referred to, Doe identified appellant. Doe said appellant "humped" him, which Doe said meant "molested." The conduct Doe described as appellant "humping" him constituted sodomy. Doe often referred to appellant's penis as his "private part," but also referred it as his "ding-a-ling" and his "dick." He referred to having to go to the bathroom after being sodomized as "when I boo-boo." He also said after being sodomized something "white with bubbles" would come out in his stool. Doe described the December book report incident as the last incident of molestation. He said appellant first "whooped him" in the bedroom with a belt, then took him to the living room and had Doe orally copulate him, then took Doe into the bathroom and sodomized him. Doe said he told Brittany because he knew she would tell her mother.

When O'Malley asked Doe how he felt about what happened with appellant, Doe said he felt "shock." Doe said appellant threatened to kill him if he told anyone. Doe said he was afraid to tell anyone because they might not believe him. However, he said he "got tired of him doing it" and "it was disgusting" and told his cousin Brittany to tell her mother. He said he was glad he "brought it out" because he "got sick of it." He said the molestation happened almost every day.

Doe admitted to O'Malley that in the past he had "said some stuff" about his mother that was not true. When O'Malley asked how she would know if he was telling her the truth, Doe said people know when he is telling the truth. He said Brittany knew he was telling the truth because he looked in her eyes in response to her request to do so and she knew he was telling the truth. He also said he was not laughing when he told Brittany, and that kids laugh when they are not telling the truth. Doe said he cried when talking to Officer Palmieri because he was afraid that Palmieri would not believe him. He was afraid no one would believe him because of his prior lies about his mother and

stepfather. He said he previously lied about his mother because he was left alone with no one to talk to and play with. He said he lied about his stepfather because his stepfather would play with his sisters but not with him.

C. *Court's Reasoning Regarding Reliability*

At the subsequent hearing on the in limine motion the court ruled Doe's out-of-court statements admissible, stating the following reasons for concluding that they bore sufficient indicia of reliability: "In terms of reliability, the court finds that the spontaneity of the statements by the minor to his cousin Brittany in the note, knowing his cousin would tell his aunt, and consistent repetition of the manner in which the acts were committed shows the reliability of such statements. [¶] The mental state of the minor is demonstrated by the fact that he came forward because he said he was tired of the abuse. The use of the terminology . . . in which he described the acts is unexpected in a child of similar age. [¶] And to further explain the court's finding . . . the court has read his description of the sexual acts which showed a knowledge of such matters far beyond the ordinary familiarity of a child of his age. [¶] And fourth, the lack of motive to fabricate is demonstrated by the fact that he was very sorry that he had to tell about these acts because they involved his father and he did not want to have to describe them. [¶] So, based upon those factors the court finds under *Brodit* and *Eccleston* and [section] 1360 that the requirements have been met."

For the following reasons, appellant contends the court erroneously concluded that Doe's hearsay statements were sufficiently reliable to be admissible under section 1360: First, the statements, particularly the note to Brittany, were not spontaneous, but were instead planned. In addition, the statements were not consistent, but were "embellished" and "refined" with each retelling. Second, Doe's mental state at the time of his statements was "unstable" given his prior false accusations against Wanda and Latasha; his animosity toward appellant, Wanda and Latasha; and his behavioral problems at school. Third, Doe's statements did not indicate a level of knowledge that was unexpected for an 11 and one-half year old, and he spent time with older siblings and had access to numerous TV channels with no parental controls. Fourth, Doe had a motive to

lie—he wanted to move back to Wanda's house due to his perceived mistreatment by appellant and Latasha. Finally, there was little, if any, evidence corroborating Doe's accusations.

We conclude the court did not abuse its discretion in finding Doe's hearsay statements reliable. Regarding the spontaneity of the statements to both Brittany and O'Malley, Doe's statements were spontaneous in the sense that Doe initiated them. (See *People v. Eccleston, supra,* 89 Cal.App.4th at p. 446.) In addition, his statements to O'Malley regarding appellant's abuse were in response to her neutral question, "could you tell me what happened?" We reject appellant's assertion that Doe's hearsay statements were not consistently repeated, but were "embellished" and "refined" with each retelling. Doe's initial and very brief statement to Brittany that appellant had been sodomizing him was not inconsistent with his much longer statements to Karla and O'Malley. Doe's statements to Karla and O'Malley were remarkably consistent as to the "general outline of abuse" (*id.* at p. 446), and it is understandable that he imparted extra details of the abuse to the interviewer because of the interview format.

Regarding Doe's mental state, the record is mixed. Although he conceded to O'Malley that he had previously fabricated claims against his mother and stepfather, O'Malley conducted a lengthy colloquy with him regarding truth and falsity and questioned him as to how she would know that he was telling the truth. He also stated that in light of his prior lies he was worried that his allegation of appellant's abuse would not be believed. The court could reasonably conclude that this degree of candor enhanced, rather than detracted from Doe's reliability.

We also reject appellant's assertion that Doe's statements did not indicate a level of knowledge unexpected of an 11 and one-half year old. Doe's extremely detailed descriptions of the unpleasant physical sensations he experienced during and after being sodomized would be unusual even for an adult unless experienced firsthand. Nothing in the record before the court at the in limine hearing suggested that Doe's level of knowledge came from a source other than his personal experience.

Based on the record before the court at the in limine hearing, it could properly determine that Doe lacked a motive to fabricate based on his stated love for appellant, reluctance to report the abuse and the possibility of appellant's resulting incarceration. Appellant had the opportunity to cross-examine Doe at trial about his perceived mistreatment by appellant and appellant's girlfriend as a motive for fabricating the abuse allegations.

Finally, we reject appellant's assertion that the lack of corroborating evidence suggested that Doe's hearsay statements were unreliable. Corroboration is not necessary where the child victim testifies at trial. (See § 1360, subd. (a)(3)(A).)

After reviewing the police reports and CIC videotape, the court provided a thorough statement of its reasons for finding Doe's hearsay statements reliable. Appellant has failed to demonstrate that the court abused its discretion.

II. *The Court Properly Imposed the Upper Term*

A. *Aggravating Factors*

Appellant next contends the court erroneously relied on five of six aggravating factors in sentencing him to the upper term.[8]

Prior to sentencing, the court appointed psychologist Richard Lundeen, pursuant to Penal Code section 288.1, to examine appellant and submit to the court a written report and recommendation.[9] Dr. Lundeen opined that appellant would not be a danger to Doe or other children in the community if released. Regarding treatment, Dr. Lundeen stated " 'either [appellant] did not engage in inappropriate sexual behavior as charged, or else he has repressed those behaviors to a depth where he cannot deal with them at a conscious level at this time. In either case, he would be a poor candidate for

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[8] The People assert that appellant has waived this claim because he only objected below to the aggravating factors that the victim was particularly vulnerable and that appellant took advantage of a position of trust. (See *People v. Scott* (1994) 9 Cal.4th 331, 356.) Even assuming the claim is waived, we review it on the merits in the interests of justice and to prevent an ineffective assistance of counsel claim.

[9] Dr. Lundeen's report is not included within the appellate record but is summarized in the probation report.

rehabilitative therapy if he does not have a condition from which he is trying to rehabilitate." Appellant retained psychologist John Kincaid to conduct a psychological evaluation. Dr. Kincaid's report stated that if granted probation appellant would be unlikely to pose a risk to Doe, but it would be prudent to restrict him from direct contact with minors without the immediate presence of a responsible adult. Dr. Kincaid also stated that he saw "little likelihood that [appellant's] incarceration would be a detriment to [Doe], who had lived with him only a relatively brief time." Dr. Kincaid recommended that appellant obtain treatment which would decrease the likelihood that he would reoffend. He also stated that, if incarcerated, appellant should be referred for a mental health evaluation although "offense-specific treatments are almost nonexistent in custody."

Although the probation report did not recommend a particular sentence, it noted the following circumstances in aggravation (Cal. Rules of Court,[10] rule 4.421): (1) "The crime involved great sexual violence and callousness toward a 10-year-old child." In particular, the report noted that the victim was "brutally whipped and sodomized over 100 times in a one year period." (2) The victim was particularly vulnerable as he relied on his father, as his custodial parent, for support. (3) Appellant took advantage of his position of parental trust and trust as a police officer to commit the offense. (4) Appellant engaged in violent conduct which indicated a serious danger to children in society. The probation report noted the single mitigating factor that appellant had no prior criminal record. (Rule 4.423)

At sentencing, the court acknowledged that it had considered the probation report, psychological evaluations, sentencing memoranda, letters from the community in mitigation and letters from Doe and his mother. After denying probation, it found the sole mitigating factor was appellant's lack of prior criminal conduct. (Rule 4.423(b).) The court found the following aggravating factors: (1) The crime involved great violence and the threat of great bodily harm disclosing a high degree of viciousness and

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[10] All rule references are to the California Rules of Court.

callousness. (2) The victim was particularly vulnerable due to his age and dependence on appellant as his father and primary caretaker. (3) Appellant threatened to commit bodily injury upon the victim in an attempt to coerce the victim to recant his statements about the crime. (4) Appellant took advantage of a position of trust to commit the crime in that he is the victim's father and sole caregiver for a substantial period of time. (5) Appellant engaged in violent conduct which indicates a serious danger to the community. (6) Appellant was a peace officer at the time he committed the criminal acts, violating his duty to serve the community of which the victim was a member. After finding that the aggravating circumstances outweighed the sole mitigating factor, the court imposed the upper 16-year term.

1. *The Relationship Between Appellant and the Victim*

Appellant contends the court erred in finding the victim was vulnerable due to his age because age was an element of the charged offense. (Rule 4.420(d).) Although the victim's minority cannot be used as an aggravating factor where minority is an element of the offense (*People v. Robinson* (1992) 11 Cal.App.4th 609, 615, disapproved on other grounds in *People v. Scott, supra,* 9 Cal.4th at p. 353, fn. 16), victim vulnerability in this case was also based on the victim's dependence on appellant as his primary caretaker. Thus, the court properly based its vulnerable victim finding on a factor other than the victim's age. (*People v. Garcia* (1985) 166 Cal.App.3d 1056, 1070.)

Appellant next contends the court erred in using the victim's dependence on appellant, and appellant's taking advantage of a position of trust as the victim's father/sole caregiver as two separate aggravating factors. He relies on *Garcia,* which held that the victim's relationship to the defendant could not be used both to support a finding of vulnerability and to find that the defendant took advantage of a position of trust or confidence to commit the offense. "It does appear that these factors are two sides of the same coin. The significant circumstance is the relationship between the defendant and the victim. The circumstances that placed the defendant in a position of trust and confidence were identical to the circumstances which placed the victim in a position of vulnerability." (*People v. Garcia, supra,* 166 Cal.App.3d at p. 1070.) We agree with this

analysis and conclude that having used the relationship between appellant and the victim in support of the vulnerable victim factor (rule 4.421(a)(3)), the court could not use that fact in support of a separate aggravating factor (rule 4.421(a)(11)).

2. *Danger to Society*

Appellant next contends the court's finding that he engaged in violent conduct, which indicated he posed a serious danger to the community (rule 4.421(b)(1)), is not supported by the evidence. We disagree. The fact that appellant repeatedly forcibly sodomized Doe and forced Doe to orally copulate him suggests that the charged offense was a crime of violence. In addition, appellant's retained psychologist, Dr. Kincaid, opined that while a grant of probation would not pose a risk to Doe, it would be prudent to restrict appellant from unsupervised direct contact with minors. In addition, Dr. Kincaid recommended that appellant receive treatment to reduce the likelihood of reoffending. Dr. Kincaid's testimony provides sufficient support for the finding that appellant posed a serious danger to the community.

3. *Great Violence and Great Bodily Harm*

Appellant argues the court erred in using the fact that he threatened the victim both to find that the crime involved great violence and the threat of great bodily harm (rule 4.421(a)(1)) and to find that he threatened the victim in an attempt to coerce the victim to recant the victim's statement about the crime (rule 4.421(a)(6)). Appellant asserts the record is devoid of any violence separate from that deemed to be inherent in the acts of sodomy and oral copulation.

Even assuming the court's reliance on this factor was misplaced, the court properly found multiple aggravating factors. Sentencing courts have wide discretion in weighing aggravating and mitigating factors, and may balance them qualitatively as well as quantitatively. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) In addition, one aggravating factor alone may warrant imposition of the upper term and the court need not state reasons for minimizing or disregarding mitigating circumstances. (*Ibid.*; accord, *People v. Brown* (2000) 83 Cal.App.4th 1037, 1043-1044.)

4. *Status As Peace Officer*

Finally, appellant contends his status as a police officer was not reasonably related to his sentencing and therefore the court erroneously relied upon it as an aggravating circumstance under rule 4.408(a).[11] In particular, he argues that the abuse he inflicted on the victim was in no way related to his employment as a police officer. Moreover, he argues that his status as a police officer did not make the offense against the victim "distinctively worse than it would ordinarily have been." (*People v. Fernandez* (1990) 226 Cal.App.3d 669, 682.)

Appellant also notes that this case is factually distinguishable from *Brown*, where the defendant's status as a police officer was relied on as an aggravating factor in imposing the upper term on a firearm enhancement. In that case, the defendant shot a fellow officer with whom she was having an affair, and thereafter destroyed evidence. *Brown* stated that the trial court could properly have considered the unusual facts relating to the defendant—that the defendant was a police officer who used deadly force to solve a personal problem, caused serious injury, and thereafter destroyed evidence as an aggravating factor because peace officers are seen as having a duty to protect people, not unlawfully shoot an unarmed estranged lover. (*People v. Brown, supra,* 83 Cal.App.4th at pp. 1043-1044.) We agree with appellant that *Brown* is distinguishable from the instant case.

Again, assuming the court improperly relied on appellant's police officer status as an aggravating factor, the court properly found two aggravating factors and exercised its discretion in balancing them against a single mitigating factor. Appellant has failed to demonstrate that imposition of the upper term was an abuse of the court's discretion.

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[11] Rule 4.408(a) provides: "The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria shall be stated on the record by the sentencing judge."

B. *Blakely v. Washington*

In a supplemental brief filed pursuant to *Blakely v. Washington, supra*, 124 S.Ct. 2531, appellant contends his sentence must be reversed because in imposing the upper term the trial court, and not the jury, made the findings on aggravating factors in violation of his rights to jury trial and due process.[12] The People rejoin, in part, that appellant waived his challenge.[13]

Under the California sentencing scheme the lower, middle and upper terms constitute a range of authorized punishments for a given crime; the exercise of judicial discretion in selecting the upper term based on aggravating sentencing factors does not implicate the right to a jury determination because the upper term is within the authorized range of punishment. A defendant, such as appellant, who is convicted of continuous sexual abuse of a child under age 14, faces a maximum prison term of 16 years in prison that may be imposed "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" (*Blakely v. Washington, supra,* 124 S.Ct. at p. 2537.) As *Blakely* explained, "In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' [citation], and the judge exceeds his proper authority." (*Ibid.*) It is instructive that, in distinguishing between permissible and impermissible schemes, the court in *Blakely* explained: "In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-

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[12] The issue of whether *Blakely* precludes a trial court from making findings on aggravating factors in support of imposing an upper term sentence is currently pending in our Supreme Court. (*People v. Towne,* review granted July 14, 2004, S125677.)

[13] The California Supreme Court is currently considering the issue in *People v. Black*, review granted July 28, 2004, S126182.

year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury." (*Blakely*, at p. 2540.) Here, the 16-year upper term was the maximum statutorily authorized sentence for violating Penal Code section 288.5. The court's imposition of that maximum did not violate appellant's rights to jury trial or due process.[14]

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

STEVENS, J.

[14] After submission of this case, the United Supreme Court decided *United States v. Booker* (2005) __U.S.__ [125 S.Ct. 738] (maj. opn. of Stevens, J.).) *Booker*, in our view, clarifies that *Blakely's* Sixth Amendment concerns are inapplicable to statutory provisions that merely *permit*, but do not compel, the imposition of a particular sentence upon a particular finding of fact. In California, Penal Code section 1170 permits, but does not compel, the imposition of an upper term upon the finding of one or more aggravating factors. (See *People v. Scott, supra,* 9 Cal.4th at pp. 349-350.)

Jones, P.J., Concurring and Dissenting

I concur with the majority opinion in all respects, except its conclusion that imposition of the 16-year upper term was not unconstitutional. I conclude the case must be remanded for resentencing under compulsion of *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531] (*Blakely*), for the reasons expressed in my dissent in *People v. Picado*, review granted January 19, 2005, S129826, California Rules of Court, rule 28.2(d)(2).

In short, *Blakely* held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." (*Blakely, supra*, 124 S.Ct. at p. 2538.) It explained that the relevant "statutory maximum" is not the maximum sentence a court may impose after finding additional facts, but the maximum it may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. (*Id.* at pp. 2537-2538.) Under California's determinate sentencing scheme, the maximum sentence a court can impose without making additional factual findings is the middle term. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(a).)

In this case, the trial court relied on a number of aggravating factors as the basis for imposing the upper term. Even if the vulnerable victim factor was based on evidence other than the victim's age, I believe that *Blakely* requires a jury finding of this factor. Similarly, the factors that appellant engaged in violent conduct indicating a serious danger to the community, and the crime involved great violence and the threat of bodily harm require a jury finding under *Blakely*. Finally, even assuming the evidence shows that appellant admitted his status as a police officer, I need not reach the question whether this is unrelated to the offense, as appellant contends, because I would remand the case to the trial court to weigh whether this factor alone is sufficient to support the upper term.

United States v. Booker (2005) ___ U.S. ___ [125 S.Ct. 738] (*Booker*), addressing the applicability of *Blakely* to the federal sentencing guidelines, does not alter my conclusion. Justice Breyer's majority opinion severed from the Federal Sentencing Act

its provision (18 U.S.C.A. § 3553(b)(1)) that makes the guidelines mandatory. As a result, the guidelines are now effectively advisory; their use will not implicate the Sixth Amendment, leaving a federal court broad discretion to impose a sentence within the statutory range assigned to a particular offense. (*Booker, supra,* 125 S.Ct. at pp. 750, 757, 764.) By the mandatory language of Penal Code section 1170, subdivision (b), a California court is required to impose the middle term, unless it makes factual findings different from, or in addition to, those inherent in the jury verdict.[1]

Jones, P.J.

[1] Penal Code section 1170, subdivision (b), states: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court *shall order imposition of the middle term*, unless there are circumstances in aggravation or mitigation of the crime." (Italics added.)

APPENDIX B

Filed 5/4/05 P. v. Cunningham CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN CUNNINGHAM,

Defendant and Appellant.

A103501

(Contra Costa County Super. Ct. No. 010396-0)

ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on April 18, 2005, be modified as follows:

At the end of the last paragraph on page 15, after the sentence ending "upper term was an abuse of the court's discretion," add the following sentence:

> Remand for resentencing is unnecessary since it is not reasonably probable that the court would have imposed a lesser term had it know that some of its reasons were improper. (See *People v. Price* (1991) 1 Cal.4th 324, 492.)

There is no change in the judgment.

Respondent's petition for rehearing is denied. Jones, P.J., would grant rehearing.

Dated:_____ _____, P.J.

APPENDIX C

Court of Appeal, First Appellate District, Division Five - No. A103501
S133971

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JOHN CUNNINGHAM, Defendant and Appellant.

Petition for review denied without prejudice to any relief to which defendant might be entitled upon finality of *People v. Black* (June 20, 2005, S126182) __ Cal.4th __, 2005 WL 1421815 <http://www.courtinfo.ca.gov/opinions/documents/S126182.PDF> regarding the effect of *Blakely v. Washington* (2004) 542 U.S. __, 124 S.Ct. 2531, and *United States v. Booker* (2005) 543 U.S. __, 125 S.Ct. 738, on California law.

Brown, J., was absent and did not participate.

SUPREME COURT
FILED
JUN 29 2005
Frederick K. Ohlrich Clerk
DEPUTY

Chief Justice

APPENDIX D

Rule 4.401. Authority

The rules in this division are adopted pursuant to Penal Code section 1170.3 and pursuant to the authority granted to the Judicial Council by the Constitution, article VI, section 6, to adopt rules for court administration, practice and procedure.

Rule 4.405. Definitions

As used in this division, unless the context otherwise requires:

* * *

(b) "Base term" is the determinate prison term selected from among the three possible terms prescribed by statute or the determinate prison term prescribed by law if a range of three possible terms is not prescribed.

(c) "Enhancement" means an additional term of imprisonment added to the base term.

(d) "Aggravation" or "circumstances in aggravation" means facts which justify the imposition of the upper prison term referred to in section 1170(b).

(e) "Mitigation" or "circumstances in mitigation" means facts which justify the imposition of the lower of three authorized prison terms or facts which justify the court in striking the additional punishment for an enhancement when the court has discretion to do so.

(f) "Sentence choice" means the selection of any disposition of the case which does not amount to a dismissal, acquittal, or grant of a new trial.

* * *

(h) "Imprisonment" means confinement in a state prison.

* * *

Rule 4.406. Reasons

(a) [How given] If the sentencing judge is required to give reasons for a sentence choice, the judge shall state in simple language the primary factor or factors that support the exercise of discretion or, if applicable, state that the judge has no discretion. The statement need not be in the language of these rules. It shall be delivered orally on the record.

(b) [When reasons required] Sentence choices that generally require a statement of a reason include:

* * *

(2) Imposing a prison sentence and thereby denying probation.

* * *

(4) Selecting a term other than the middle statutory term for either an offense or an enhancement.

* * *

(7) Striking the punishment for an enhancement.

* * *

(10) Striking an enhancement or prior conviction allegation under section 1385(a).

Rule 4.408. Criteria not exclusive; sequence not significant

(a) The enumeration in these rules of some criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. Any such additional criteria shall be stated on the record by the sentencing judge.

(b) The order in which criteria are listed does not indicate their relative weight or importance.

Rule 4.409. Consideration of criteria

Relevant criteria enumerated in these rules shall be considered by the sentencing judge, and shall be deemed to have been considered unless the record affirmatively reflects otherwise.

Rule 4.420. Selection of base term of imprisonment

(a) When a sentence of imprisonment is imposed, or the execution of a sentence of imprisonment is ordered suspended, the sentencing judge shall select the upper, middle, or lower term on each count for which the defendant has been convicted, as provided in section 1170(b) and these rules. The middle term shall be selected unless imposition of the upper or lower term is justified by circumstances in aggravation or mitigation.

(b) Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence. Selection of the upper term is justified only if, after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation. The relevant facts are included in the case record, the probation officer's report, other reports and statements properly received, statements in aggravation or mitigation, and any further evidence introduced at the sentencing hearing. Selection of the lower term is justified only if, considering the same facts, the circumstances in mitigation outweigh the circumstances in aggravation.

(c) To comply with section 1170(b), a fact charged and found as an enhancement may be used as a reason for imposing the upper term only if the court has discretion to strike the punishment for the enhancement and does so. The use of a fact of an enhancement to impose the upper term of imprisonment is an adequate reason for striking the additional term of imprisonment, regardless of the effect on the total term.

(d) A fact that is an element of the crime shall not be used to impose the upper term.

(e) The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate

facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected.

Rule 4.421. Circumstances in aggravation

Circumstances in aggravation include:

(a) Facts relating to the crime, whether or not charged or chargeable as enhancements, including the fact that:

(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness.

(2) The defendant was armed with or used a weapon at the time of the commission of the crime.

(3) The victim was particularly vulnerable.

(4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission.

(5) The defendant induced a minor to commit or assist in the commission of the crime.

(6) The defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process.

(7) The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed.

(8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism.

(9) The crime involved an attempted or actual taking or damage of great monetary value.

(10) The crime involved a large quantity of contraband.

(11) The defendant took advantage of a position of trust or confidence to commit the offense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has engaged in violent conduct which indicates a serious danger to society.

(2) The defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings are numerous or of increasing seriousness.

(3) The defendant has served a prior prison term.

(4) The defendant was on probation or parole when the crime was committed.

(5) The defendant's prior performance on probation or parole was unsatisfactory.

(c) Any other facts statutorily declared to be circumstances in aggravation.

Rule 4.423. Circumstances in mitigation

Circumstances in mitigation include:

(a) Facts relating to the crime, including the fact that:

(1) The defendant was a passive participant or played a minor role in the crime.

(2) The victim was an initiator of, willing participant in, or aggressor or provoker of the incident.

(3) The crime was committed because of an unusual circumstance, such as great provocation, which is unlikely to recur.

(4) The defendant participated in the crime under circumstances of coercion or duress, or the criminal conduct was partially excusable for some other reason not amounting to a defense.

(5) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(6) The defendant exercised caution to avoid harm to persons or damage to property, or the amounts of money or property taken were deliberately small, or no harm was done or threatened against the victim.

(7) The defendant believed that he or she had a claim or right to the property taken, or for other reasons mistakenly believed that the conduct was legal.

(8) The defendant was motivated by a desire to provide necessities for his or her family or self.

(9) The defendant suffered from repeated or continuous physical, sexual, or psychological abuse inflicted by the victim of the crime; and the victim of the crime, who inflicted the abuse, was the defendant's spouse, intimate cohabitant, or parent of the defendant's child; and the facts concerning the abuse do not amount to a defense.

(b) Facts relating to the defendant, including the fact that:

(1) The defendant has no prior record, or an insignificant record of criminal conduct, considering the recency and frequency of prior crimes.

(2) The defendant was suffering from a mental or physical condition that significantly reduced culpability for the crime.

(3) The defendant voluntarily acknowledged wrongdoing prior to arrest or at an early stage of the criminal process.

(4) The defendant is ineligible for probation and but for that ineligibility would have been granted probation.

(5) The defendant made restitution to the victim.

(6) The defendant's prior performance on probation or parole was satisfactory.

05-6551 ORIGINAL

CERTIFICATE OF SERVICE

I, Peter Gold, am over 18 years of age. My business address is 2269 Chestnut Street, #124, San Francisco, California, 94123. I am not a party to this action.

On September 16, 2005, I served the within

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION FIVE

upon the parties named below by depositing a true copy in a United States mailbox in Libertyville, Illinois, in a sealed envelope, postage prepaid, and addressed as follows:

Supreme Court, U.S.
FILED
SEP 17 2005
OFFICE OF THE CLERK

Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102

First District Appellate Project
730 Harrison Street, Suite 201
San Francisco, CA 94107

Clerk of the Court
Court of Appeal
First District, Division Five
350 McAllister Street
San Francisco, CA 94102

John Cunningham
(retained for appellant)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 16, 2005.

Peter Gold

BEST AVAILABLE COPY